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In The
Supreme Court of the United States

October, Term 1983

No. _____

STATE OF NEBRASKA, EX REL.,
GREGORY A. MERCURIO, JR.,

Petitioner,

vs.

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

QUESTION PRESENTED

1. Does the failure of an administrative agency to adhere to its own procedural regulations and to the regulations created by 45 C.F.R. 99 in a grade appeals hearing or challenge of educational records regarding the production and availability of all educational records and materials used in determining a student's final grade constitute the denial of due process of law?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

The Petitioner, State of Nebraska, Ex Rel., Gregory A. Mercurio, Jr., Relator-Appellee, in the proceedings below, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nebraska, entered in these proceedings on January 7, 1983 and upon which a motion for rehearing was denied on February 16, 1983.

OPINIONS BELOW

The opinion issued by the Supreme Court of the State of Nebraska on January 7, 1983 is reported at 213 Neb. 251,

329 N.W.2d 187, (1983) and appears in the separate Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was entered on January 7, 1983. A timely motion for rehearing was denied on February 16, 1983 and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory and regulatory provisions are involved in the resolution of this matter: (1) Constitution: United States Constitution, Amendment XIV, Section; (2) Statutes: 20 U.S.C. §1232(g); (3) Regulations: 45 C.F.R. §99 and University of Nebraska Medical Center Procedural Guidelines for Handling Student Appeals of Academic Evaluations (Appendix B).

STATEMENT OF THE CASE

This suit was filed on September 17, 1979 by Gregory A. Mercurio, Jr. seeking a writ of mandamus to be issued to the Respondent, The Board of Regents of the University of Nebraska, directing it to remove from Petitioner's educational records a final transcribed grade of "F" in a course entitled Biochemistry 510/810.

The issue proceeded to trial before the Court sitting without a jury on the Court's order to Respondent to show cause why a writ of mandamus should not issue requiring the requested relief.

At all times relevant hereto the Petitioner was a student at the University of Nebraska Medical Center in Omaha, Nebraska. That institution is, essentially, divided into two parts; professional students seeking a medical doctorate and graduate students seeking a masters or Phd. Petitioner was a student in the graduate school pursuing a master's degree. The Biochemistry 510/810 course was offered jointly to medical students and graduate students. Although the course was taught by many instructors, the Chairman of the Biochemistry Department, Dr. William Ruegamer, served in the position of chief responsibility for the course.

Grading in the course was to be purely objective, based upon the results of three written multiple choice examinations. These examinations were conducted periodically throughout the semester and the results of the examinations, although available, were not distributed to students. Following examinations, the students turned in their examination papers and then self-scored their performance by reference to answers posted following the examinations. This was the procedure employed by the Petitioner. It was only after completion of the course that the Petitioner learned that he had been assigned a failing grade. The Petitioner was the only student to receive a failing grade in the course. The Petitioner's assigned grades for the examinations number 1, 2 and 3 were "F", "F" and "C", respectively. Upon learning of this assigned grade the Petitioner sought to review his test papers

and to discuss the situation with Dr. Ruegamer. While discussions with Dr. Ruegamer were had, review of the test papers by Petitioner was not permitted. As the review and discussion efforts were unsuccessful, Petitioner sought in September of 1978 the commencement of an on-campus grade appeals procedure but was unable to do so as a new procedure was being written and was not yet in place. Eventually the grade appeals procedure became available and the appeal was filed in May of 1979.

Before the grade appeals committee was convened, it became apparent that there were fundamental disputes between Petitioner and Respondent as to the procedures to be employed regarding the conduct of the hearing. Failing a resolution of those differences, the Petitioner filed his original Petition for writ of mandamus which requested the District Court of Douglas County, Nebraska to require Respondent to conduct the hearing pursuant to statutory rules governing state administrative agencies and to require the Respondent to allow the presence of counsel, witnesses, presentation of certain evidence and a right of cross-examination. At the suggestion of the Trial Judge, the parties reached a compromise as to these procedural differences and the committee convened to hear the grade appeal in March of 1980. The action was not dismissed as the trial court retained jurisdiction for the purpose of insuring that Petitioner would receive a full and fair hearing consistent with the requirements of due process. Following the hearing the grade appeals committee appointed by the Respondent voted not to sustain Petitioner's appeals. Subsequently, exhausting the last of his administrative remedies, the Petitioner took an "in house" appeal of the committee's decision to the University Vice President of Ac-

ademic Affairs, whose decision declined to reverse that entered by the Grade Appeals Committee. Petitioner then filed his Amended Petition with the Trial Court.

Petitioner alleged in his Amended Petition with the Trial Court that 20 U.S.C. §1232(g) also known as the Federal Educational Rights of Privacy Act (hereinafter F.E.R.P.A.), the regulations adopted by the Department of Education (then the Department of Health, Education and Welfare) found at 45 C.F.R. §99 and the University's Procedural Guidelines for Handling Student Appeals of Academic Evaluations (Appendix B) required that all materials used in determining a student's final grade or academic evaluation must be presented before the Tribunal reviewing the challenge. The Trial Court's order, including findings of fact, appears in the separate Appendix C hereto.

The Trial Court found that the examination papers of every other student in a class of more than 170 students were available except for the papers of the Petitioner (Appendix C, Pages 27-28). The Court found that the Grade Appeals Committee was an administrative agency within the meaning of Nebraska statutes (Appendix C, Pages 25-26). Petitioner's examination papers from examinations number 1 and number 2 were not produced by the Respondent at the Grade Appeals hearing and were not made available to Petitioner (Appendix C, Page 25). The Trial Court determined that the Respondent was required to show cause why the relief sought should not be granted and that the Respondent had failed to offer any creditable as to why the documents were not available to Petitioner (Appendix C, Page 25).

Additional fact findings were made by the Court determining that the Petitioner sought to review his educational records but was denied, that the Respondent had a duty to preserve the educational records for Petitioner's review and use at hearing, but failed to do so, and that the Respondent had failed to produce these records where there was an outstanding request for review by Petitioner.

As to the conduct of Respondent regarding this matter, the Court made a specific finding:

> ... the Court is impressed and does hereby record that the conduct of the employees and agents of the Respondent, Board of Regents, was both arbitrary and capricious. (Appendix C, Page 28).

Based upon the above findings the Trial Court found that the Respondent had maintained Petitioner's educational record in a manner inconsistent with Petitioner's rights of due process and, accordingly, ordered the educational record to be amended by striking therefrom the challenged portion. The Respondent then took its appeal to the Supreme Court of the State of Nebraska which reversed the Trial Court and dismissed Petitioner's action.

This case was pled, argued and decided by the Trial Court upon the question of whether or not the Petitioner had been denied due process of law. That was, of course, the issue presented to the Nebraska Supreme Court. Significantly, and curiously, the opinion rendered by the Nebraska Supreme Court is silent as to that issue. Petitioner's motion for rehearing before the State Supreme Court argued that the Court had failed to consider the issue of deprivation of Petitioner's

right of due process. That motion was summarily overruled without opinion.

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REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari for the following reason:

I.

The Petitioner has been denied due process of law and the Court below has failed to consider that claim or protect that right.

The threshold question in this litigation involves the classification of the Respondent. As this is a mandamus action claiming deprivation of due process, the Respondent's obligation to provide due process is dependent upon that classification. The Petitioner has alleged and the Court has held that the Respondent is a state agency. The relevant statute, §84-901, R.R.S. Nebraska 1943 (Reissue 1980) provides in relevant part:

> (1) Agency shall mean each board, commission, department, officer, division, or other administrative officer or unit of the State Government authorized by law to make rules, except the Adjutant General's Office as provided in Chapter 55, the court's, including the Nebraska Workmen's Compensation Court, the Commission of Industrial Relations, and the legislature.

Although not considered within the parameters of Chapter 84, the Supreme Court of the State of Nebraska has considered the status of The Board of Regents of the University

of Nebraska to be a state agency. In *Catania v. The University of Nebraska,* 204 Neb. 304, 282 N.W. 2nd 27 (1979) the Plaintiff brought suit against The Board of Regents of the University of Nebraska pursuant to the Tort Claims Act, §81-8,208, R.R.S. Nebraska 1943 (Reissue 1976). The definition of state agency in the Tort Claims Act is virtually identical to that contained in the Administrative Procedures Act. In reviewing the statute the Court in *Catania, supra,* firmly resolved the status of the Board of Regents of the University of Nebraska by holding:

> . . . but considering our own statutes and the constitutions as well as our own case law, we believe and hold that The Board of Regents of the University of Nebraska is an agency of the State. *Supra* at 311.

Of course, a state agency must afford due process. U.S. Const. Amend. XIV, Sec. 1.

In *Goos v. Lopez,* 419 U.S. 565, 95S. Ct. 729, 42 L. Ed. 2nd 725 (1975) the Court observed, ". . . once it is determined that due process applies, the question remains what process is due." The Respondent had suggested that the Court apply a "hands-off" approach to the application of due process in educational matters, citing *Board v. Horowitz,* 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2nd 124 (1978). There are, however, limitations upon that hands-off policy. *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S. Ct. 507, 510 L. Ed 2d 515 (1971). And in *Greenhill v. Bailey,* 519 F. 2d 5 (1975) the Court summarized the measure of judicial intervention in educational matters as follows:

> It is true that the courts will ordinarily defer to the broad discretion invested in public school officials and will

> rarely review an educational institution's evaluation of the academic performance of its students. Notwithstanding this customary "hands-off" policy judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property. It is well established that when such a deprivation occurs, the procedural safeguards embodied in the 14th Amendment are called into play and the courts will not hesitate to require the affected individual be accorded such protection. (Citations omitted). *Supra* at 7.

The mantel of educational institution does not serve to excuse due process compliance.

In more recent years, certain procedural requirements have been codified. Congressional legislation sometimes known as the Buckley-Pell Amendment and more commonly known as the Federal Educational Rights and Privacy Act (hereinafter FERPA) is found at 20 U.S.C 1232(g). Responsibility for implementation of the Act is placed with Department of Education which, at that time, was a part of the Department of Health, Education and Welfare. The H.E.W. final rule on educational records was published June 17, 1976 and is found at 45 C.F.R. 99. At this point it is important to review the portions of FERPA relevant to the actions of the parties herein.

Upon learning of the assignment of a final grade of "F" in the Biochemistry course, the Petitioner sought to review his records regarding this matter. FERPA grants a student the right to inspect and review his educational records. 45 C.F.R. (§99.11). However, no such inspection or review was permitted by the Respondent. It is also important to note that

examination papers are classified as "educational records". 45 C.F.R. 99 (§99.3).

As noted earlier herein, the Petitioner sought to challenge and amend his educational records by the filing of a grade appeals procedure. The right of challenge is conferred by FERPA in 45 C.F.R. 99 (§99.20). A hearing in such a case is a matter of right. 45 C.F.R. 99 (§99.21).

The regulation at 45 C.R.F. 99 (§99.11)(b) (2) grants a student the right to obtain his educational records where the failure to obtain such copies would effectively prevent the student from challenging the accuracy of his academic record. And §99.13 prohibits destruction of such educational records where there is an outstanding request for review. In the case at bar, the student made a request to inspect his educational records and demanded all records including all test papers be produced at his grade appeals hearing. The evidence at trial indicated that the Chairman of the Grade Appeals Committee requested the responsible professor to submit all such materials including all examination papers for both the first and second examinations and that the University failed so to do.

In summary, FERPA grants to a student such as the Petitioner the right to inspect and review his educational records, prohibits the destruction of the records when there is an outstanding request for review and mandates that right of the student to obtain the records when necessary in the conduct of a hearing upon the challenge of his educational records. Here there is no dispute as to the facts. The Respondent failed to fulfill its obligations under any of the above-cited sections. The manner of non-compliance is also noteworthy.

A total of over 170 students were enrolled in the class and, at three examinations each, there were more than 510 examination papers. The Relator's third examination paper bearing the grade of "C" was produced. His examination test booklet bearing the answers for examination number one was not produced. This is particularly interesting as this was a make-up examination, the Petitioner having missed the regularly scheduled examination by virtue of excused medical absence. And, according to the testimony of Dr. Ruegamer, make-up examinations are assigned a security status as they are reused in subsequent years and are, therefore, closely guarded. The Petitioner's test booklet containing his examination answers was not produced at any stage of the proceedings herein although it was in the possession of agents of the Respondent at the time the Relator commenced the twin procedure of grade appeal and challenge of educational records.

Petitioner's examination number two test responses were contained on a computer answer sheet, which answer sheet was again in the possession of the agents of the Respondent at the time Petitioner commenced his grade appeal and educational records challenge proceedings. Yet at subsequent University proceedings and at the hearings in the Court below, the Respondent was unable to produce this answer sheet.

This non-compliance by the Respondent is especially noteworthy in that of the 510 plus examination papers only these two, those of the Petitioner, could not be produced by the Respondent.

The above-discussed FERPA rules are procedural in nature in that they require an educational institution to make

available to a student evidence which he must have to conduct a hearing upon an educational record challenge and which evidence is solely in the possession of the educational institution. The failure or the refusal of the Respondent to comply with these requirements creates not only a substantive violation but also renders ineffective any hearing which may be held by virture of the procedural irregularities. This due process deprivation becomes more apparent when viewing the misconduct of the Respondent in light of the University hearings which were held.

It is important at this juncture to note that the Board of Regents of the University of Nebraska has, by its own By-Laws (Paragraph 5.3) established a grade appeals procedure as it is required so to do by FERPA. That By-Law provides as follows:

> Each college or school shall provide for a faculty-student appeals committee for students who believe that an evaluation of their academic process has been prejudiced or capricious. Such procedure shall provide for the changing of a student's evaluation upon the committee's finding that an academic evaluation by a member of the faculty has been improper.

The procedural guidelines for handling student appeals of academic evaluations provides that the University must provide all materials used in determining the challenged evaluation or educational record. Of course, by failing to provide the examination answer papers, the Respondent failed to abide by the terms of its own procedural rules. It is axiomatic to suggest that an agency of the state is required to follow its own rules and, in this instance, the failure to do so is a separate and distinct due process violation.

The nature of this case becomes quite clear when viewing the FERPA nad Regent's By-Law requirements and the Respondent's failure to comply with same in light of proceedings conducted in the case at bar. The University of Nebraska Procedural Guidelines for handling student appeals of academic evaluations provides that in a hearing appealing a grade and/or challenging an educational record, the student must sustain a burden of proof in showing that the evaluation or educational record is arbitrary, unreasonable or otherwise improper. This is a wholly proper and legitimate assignment of burden. However, the problem in this case is apparent. The student is both expected and required to carry the burden of proof and, recognizing this, both the federal and state requirements insist that the educational institution make available to him the documents solely in its possession without which no such challenge could be successful. The Petitioner's lack of success at the University level is positive proof of the wisdom of that foresight.

It is important to note at this point that the Respondent does not seek a right of private enforcement of FERPA. By virtue of the negligence or misconduct of the Respondent, compliance with the requirements of FERPA or with the University's own procedural guidelines has become an impossibility. Petitioner does, however, urge the simple proposition that the Respondent should not prevail in this matter because it failed to grant Petitioner required due process.

The standard for review of administrative action is set forth in *Citizens to Preserve Overton Park, Inc., et al v. Volpe, Secretary of Transportation, et al,* 401, U.S. 402, 91 S. Ct. 841 28 L. Ed. 2d 136. (1971). In that case this Court announced a three-pronged test, holding that the Court must:

1. Decide whether the agency acted within the scope of its statutory authority;

2. If it has, then determine whether the agency's actual choice was arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law; and

3. Final inquiry is whether the agency followed the necessary procedural requirements.

See also *Wayne State University v. Cleland,* 570 F. 2nd 627, 6 Sir (1978), *Blackburn v. Motor Vehicles Division* 567 P. 2d 1267 (1978) and *Oglala Sioux Tribe of Indians v. Andrus,* 603 F. 2d 707 (1979).

In the case at bar there should be no questions as to the first two "prongs". The Grade Appeals Committee appointed by Respondent was established to review cases of this type and, clearly, undertook the hearing within the scope of its statutory authority. The second "prong" is as easily reviewed. A determination of whether or not the agency was arbitrary, capricious or whether it committed an abuse of discretion is a factual determination which, in this case, was made in the affirmative by the Trial Court. The third inquiry, as to whether or not the agency followed the necessary procedural requirements, is the remaining issue before this Court.

As discussed hereinabove, both the FERPA regulations (45 C.F.R. 99) and the University's procedural guidelines for handling student appeals of academic evaluations require, *as a matter of procedure,* that all materials used in determining a student's grade or academic record be made available at a hearing held for the purpose of considering a student's challenge to that academic record. Although cognizant of those

requirements, the Respondent conducted the hearing not in accordance therewith and issued a decision contrary to Petitioner.

Under Nebraska law, the mandamus action, and the relief afforded thereby, is the appropriate remedy in the event of a denial of due process by a state agency. §25-2156 R.R.S. Nebraska 1943 (Reissue 1979), *State v. City of Grand Island*, 145 Neb. 150, 15 N.W. 2d 341 (1944), *State v. Hyland*, 75 Neb. 767, 107 N.W. 2d 113 (1906), *Jackson v. State*, 57 Neb. 183, 77 N.W. 2nd 662 (1898).

In finding for the Respondent, the Nebraska Supreme Court treated this case as raising an issue of evidence, holding that an original document is not required and other evidence of the contents of a writing, recording or photograph are admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. It is respectfully submitted to this Court, that such a holding is irrelevant to the facts and issues raised by the case. This is true for two reasons. First, no such copies or secondary evidence exist and were not, therefore, offered by the Respondent at trial. Secondly, of course, the question is one of procedural compliance.

To grant or not to grant due process is not a discretionary decision. There can be no question in this case that the Respondent has failed to grant to the Petitioner due process of law as required. Yet the decision of the Supreme Court of the State of Nebraska not only failed to protect the Petitioner's right of due process of law, it failed to so much as discuss the existence of such a right.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nebraska.

Respectfully submitted,

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APPENDIX TO BRIEF
NEBRASKA SUPREME COURT JUDGMENT

State ex rel. Mercurio v. Board of Regents
No. 44511 — filed January 7, 1983.

1. Evidence. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. Neb. Rev. Stat. §27-1004 (Reissue 1979).

2. _____. Secondary evidence of the contents of a writing, the original of which would have been competent evidence, may be admitted into evidence if it is shown by satisfactory proof that the originals have been lost or destroyed in the absence of bad faith, malice, or fraud.

3. Colleges and Universities: Evidence: Appeal and Error. In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance.

4. Mandamus. Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear.

Heard before Krivosha, C.J., Boslaugh, McCown, Clinton, White, and Hastings, JJ.

McCOWN, J.

This is an action by a student for a writ of mandamus requiring the respondent Board of Regents to remove a failing

grade from the transcript of his grade record at the University of Nebraska. The District Court found that the respondent had a duty to produce for the relator his educational records and had not done so, and issued a peremptory writ of mandamus ordering respondent to remove from the student transcript of the relator the transcribed grade of "F" in the biochemistry course involved. This appeal followed.

In the summer of 1978 Gregory A. Mercurio, Jr., a graduate student, enrolled in a biochemistry course which was conducted as a part of the graduate studies program at the University of Nebraska Medical Center in Omaha. The class consisted of 177 students and was taught by several faculty members. Dr. Ruegamer, chairman of the biochemistry department and chief lecturer in the course, served as overall faculty coordinator. Grades for the course were based upon three multiple-choice examinations. For the three regularly scheduled examinations students recorded their answers to the multiple-choice questions by blackening circles on computer answer sheets. The answer sheets were identified by each student's name and social security number, which he or she wrote on the answer sheet. The answer sheets were then computer graded. The result was a computer printout showing the percentage score each student had received.

Students unable to take a regularly scheduled examination were allowed to take a makeup examination. Approximately six to eight students normally took the makeup examination. A student taking the makeup examination recorded answers directly on the examination booklet, which was then hand graded by a faculty member immediately after the examination had concluded.

Each student's score on each examination for the regularly scheduled or makeup examination was then recorded on his or her separate grade record sheet maintained by the biochemistry department. The score recorded was taken directly from the computer-graded or hand-graded examination booklet. Following the examination, although the results were not distributed, students could find out their scores by asking the secretary for the biochemistry department.

Mercurio was unable to take the first regularly scheduled examination and, instead, took the makeup examination on August 4, 1978. This examination was hand graded and a score of "F-42" was entered on Mercurio's grade record sheet. Mercurio took the two last regularly scheduled examinations on August 26 and September 6, 1978, respectively. Grades of "56-F" for the August 26 examination and "69.3-C" for the September 6 examination were recorded on Mercurio's grade sheet. Mercurio's average for all three examinations was 56 percent. The biochemistry department grading committee established a grade of 60 percent as the dividing line between a "D" and an "F." That cutoff point was determined without knowledge as to how any particular student had performed in the course. Mercurio received the only failing grade in the class.

On September 15, 1978, Mercurio, having learned of his failing grade, met briefly with Dr. Ruegamer. Mercurio advised Ruegamer that he felt he had made a transposition error in filling in his answers on the answer sheet for the second examination. Dr. Ruegamer agreed to review the matter and meet with Mercurio again.

At the second meeting, Ruegamer reviewed Mercurio's answer sheet for examination No. 2 with him and told Mercurio that he and other members of the department had undertaken an elaborate review of the examination booklet and the materials supplied by Mercurio, and that both Dr. Ruegamer and another faculty member had inspected and hand graded Mercurio's answer sheet and both reached the same 56 percent result as the computer grade. Dr. Ruegamer also explained that the department could not make any grade adjustments based upon a transposition error after examinations had been handed in and graded.

Mercurio then sought to commence a grade appeals procedure within the university to review his grade in the biochemistry course. He was informed that a new procedure for grade appeals was being written but was not yet completed. The new procedure went into effect in May 1979 and Mercurio filed his appeal. When the appeal was filed, Dr. Ruegamer discovered that Mercurio's answer sheet for examination No. 2 was missing and had apparently been lost at some time after the second meeting between Dr. Ruegamer and Mercurio. That answer sheet has never been found. A hearing was scheduled before the grade appeals committee for September 18, 1979. A dispute arose between Mercurio and the grade appeals committee about the proper procedures to be used at the hearing.

On September 17, 1979, Mercurio filed a petition in the District Court for an alternative writ of mandamus requiring that the respondent Board of Regents conduct the grade appeals hearing in accordance with statutory provisions for administrative agency hearings and that the formal rules of

evidence applicable to district court proceedings be followed. At the suggestion of the trial court the parties reached a compromise as to the procedural difficulties and Mercurio's grade appeals hearing was held by the committee in March 1980. The District Court retained jurisdiction to insure that the hearing would comply with the requirements of due process.

In preparing for the grade appeals hearing the parties discovered that all of the makeup examination booklets for the first examination were also missing. Mercurio's answer sheet for the last regular examination was available and was furnished to Mercurio, together with the other educational records except for the two examination booklets. The grade appeals committee heard the appeal despite the absence of Mercurio's two answer sheets and concluded that Mercurio's failing grade should remain on the transcript. Mercurio appealed to the vice president for academic affairs, who affirmed the decision of the grade appeals committee.

On October 31, 1980, Mercurio filed an amended petition in the District Court seeking an alternative writ of mandamus requiring that the respondent remove the "F" from his student transcript. Mercurio alleged that he was entitled to inspect his educational record and that respondent was obligated to produce all materials used in determining Mercurio's final grade, and that respondent failed to produce his answer sheets for examination Nos. 1 and 2 and that the absence of those records prohibited him from successfully appealing his grade or challenging the educational records, thus depriving him of due process of law.

Show cause hearings were held before the District Court on November 20, 1980, and again on February 25, 1981. The

court received into evidence Mercurio's grade sheet containing his scores for all three examinations; a computer printout listing all of the students' scores for examination No. 2, including Mercurio's 56 percent score; the audio tape from the grade appeals hearing; and copies of the grade appeals procedure adopted by the university. Various witnesses testified to the facts outlined above and a faculty member testified as to his knowledge that Mercurio had received a 42 percent grade for makeup examination No. 1.

Mercurio testified that he had called the departmental secretary shortly after taking the makeup examination No. 1 and was informed of his grade, but that he did not contact the department to find out his grade after examination No. 2. He also testified that he went to the departmental office after examination No. 3 and received his score on that test. The departmental secretary also testified that she recorded Mercurio's scores on all three examinations directly from his answer sheets to his grade sheet.

The trial court held that under the federal educational rights and privacy act, 20 U.S.C. 1232(g) (1976), and regulations thereunder (45 C.F.R. §99 (1981)), and paragraph 5.3 of the bylaws of the Board of Regents and the grade appeals procedure adopted thereunder, the board had a duty to produce Mercurio's educational records for his review and use at the hearings. The court also determined that the federal regulations prohibit destruction of such educational records where there is outstanding a request for review, and that the board had a duty to produce the documents pertaining to examination Nos. 1 and 2.

The court concluded that there was no satisfactory explanation by the board as to why the documents could not be produced and entered a peremptory writ of mandamus requiring the board to remove from the student transcript of Mercurio the transcribed grade of "F" in the course entitled Biochemistry 510/810. The trial court refused supersedeas as untimely. The grade was expunged in compliance with the writ and this appeal followed.

On appeal Mercurio contends, as the trial court found, that because the board could not produce two of Mercurio's three examination papers, the board must expunge from the record his failing grade in a biochemistry course. The argument is that because the university had a duty to grant Mercurio the right to inspect and review his educational records and also was obligated not to destroy records when there was an outstanding request to inspect and review them, therefore the failure of the university to produce the two specific records entitled Mercurio to have his grade expunged. We disagree.

The federal educational rights and privacy act and regulations thereunder, together with the bylaws of the University of Nebraska and the grade appeals procedure of the University of Nebraska Medical Center, grant to a student the right to inspect and review his educational records, and prohibit the destruction of records when there is an outstanding request to inspect and review them. They also provide for a hearing in cases where a student wishes to challenge the accuracy of his educational records.

The basic problem with Mercurios' contention is that it treats the original document as the only admissible evidence of the contents of the document. The argument also assumes,

in spite of the evidence, that the absence of the document was the result of bad faith, malice, or fraud on the part of the university. There is no evidence of bad faith, malice, or fraud on the part of the university, the faculty, or the board in this record.

The only real issue in this case is whether Mercurio's grades on the two missing examination papers and his consequent failing grade for the course were accurate or inaccurate. Neb. Rev. Stat. §27-1004 (Reissue 1979) provides in relevant part: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

"(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ."

Secondary evidence of the contents of a writing is generally admissible where it is shown that the original writing has been lost or destroyed. This state has followed the general rule. In *In re Estate of Baker,* 144 Neb. 797, 806, 14 N.W.2d 585, 590-91 (1944), this court said: "Of course, the rule is that secondary evidence of the contents of a letter or telegram, the original of which would have been competent evidence, cannot be given unless some legal excuse is shown for failing to produce the original. If it is shown by satisfactory proof that the originals have been lost or destroyed one of the principal objections to secondary evidence at once disappears and such evidence becomes admissible. Their loss or destruction need not be proved beyond the possibility of mistake as the court is vested with a judicial discretion in the matter and it is enough if the testimony satisfies the court of the fact with reasonable certainty. If they are accidentally destroyed by a

party without fault secondary evidence may be given of their contents, and even if their destruction is voluntary secondary evidence of their contents may be given if the circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose."

In the case at bar the testimony of various faculty and administrative personnel was uncontradicted that they had examined the missing documents, had graded them, and that that grade was directly transferred to the grade record sheet of Mercurio. There is simply no evidence of bad faith, malice, or fraud. If we accepted Mercurio's argument, any student who received a failing grade in any course who discovered one of his examination papers was missing from the university records could have his grade expunged because the record had been lost, misplaced, or destroyed. The secondary evidence as to the missing documents in the present case was given by witnesses under oath and subject to the rigors of cross-examination, and it was more than sufficient to establish the accuracy and validity of the grading of the missing documents.

In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. See, *Depperman v. University of Kentucky,* 371 F. Supp. 73 (E.D. Ky. 1974); *Greenhill v. Bailey,* 378 F. Supp. 632 (S.D. Iowa 1974), *reversed on other grounds* 519 F.2d 5 (8th Cir. 1975); *Connelly v. University of Vermont and State Agr. Col.,* 244 F. Supp. 156 (D. Vt. 1965).

Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the par-

ticular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear. *Singleton v. Kimball County Board of Commissioners,* 203 Neb. 429, 279 N.W.2d 112 (1979); *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 277 N.W.2d 246 (1979).

In the present case the relator has failed to show that he is clearly and conclusively entitled to the particular relief requested and granted and that the respondent board was legally obligated to act. Although we do not determine whether Mercurio had an adequate remedy at law, mandamus was not appropriately granted on the evidence in this case. The writ of mandamus is vacated. The judgment is reversed and the cause of action dismissed.

WRIT OF MANDAMUS VACATED.
REVERSED AND DISMISSED.

Caporale, J., not participating.

OFFICE OF CLERK OF THE SUPREME COURT

Lincoln, NE 68509 2/16/83

IN CASE OF

State ex rel. Mercurio v. Board of Regents,

No. 44511 (764-47)

THE FOLLOWING ORDERS HAVE BEEN MADE:

motion of appellee for rehearing overruled

Respectfully,
LARRY D. DONELSON, CLERK.

APPENDIX B
UNIVERSITY OF NEBRASKA MEDICAL CENTER

PROCEDURAL GUIDELINES FOR HANDLING STUDENT APPEALS OF ACADEMIC EVALUATIONS

1. Paragraph 5.3 of the Bylaws of the Board of Regents provides in part as follows: "* * * * Each college or school shall provide for a faculty-student appeals committee for students who believe that evaluation of their academic progress has been prejudiced or capricious. Such procedure shall provide for changing of student's evaluation upon the committee's finding that an academic evaluation by a member of a faculty has been improper."

2. In accordance with the foregoing the faculty of each college or school constituting a part of the University of Nebraska Medical Center shall adopt a method for creating a faculty-student appeals committee. Such committee shall consist of at least four members, including the chairman, and shall include at least one student representative. The chairman of the committee shall be selected in such manner as the faculty of the college or school determines and shall in all cases vote as a member of the committee. The committee may adopt such rules as it deems necessary or advisable provided they are not inconsistent with these guidelines.

3. The committee may be given such name as the college or school selects (e.g., grade appeals committee, etc.) but as used in these guidelines the term "committee" shall mean the faculty-student appeals committee referred to in paragraph 5.3 of the Bylaws of the Board of Regents. The committee

shall have no other function than to investigate and/or hear appeals involving grades and other academic evaluations, except that in the case of the Graduate College, the faculty-student appeals committee may include the voting membership of the Campus Graduate Council.

4. The committee of the college or school in which a particular course is offered shall have jurisdiction of all appeals by students whose appeal concerns a grade or academic evaluation involving that course. In matters involving a dual listed course, the committee of the college or school granting admission to the course shall handle any appeal.

5. The committee shall not have jurisdiction over appeals by students where disciplinary action is proposed because of violation of law or of university rules or regulations, disruptive or insubordinate behavior, or academic dishonesty such as cheating or plagiarism. Such matters are the jurisdiction of the college or school's student discipline hearing board.

6. In any matter involving an appeal by a student, neither the Dean of the college or school nor the instructor whose grade or evaluation is being questioned nor the chairman of the department involved shall serve on the committee. The Dean shall designate temporary replacements on the Committee if necessary.

7. Students desiring to appeal a grade or an evaluation of their academic progress, not involving academic dismissal or suspension, shall proceed as follows:

a. A student who believes that his/her grade or evaluation is the result of prejudice or caprice or is otherwise improper shall first discuss the matter directly with the

instructor involved. If the student and instructor do not reach a satisfactory agreement, the student may appeal either orally or in writing to the chairman of the department in which the course is offered. If the student and chairman do not reach a satisfactory agreement, the student may submit within two weeks following reporting or posting of the grade or evaluation in question, an appeal in writing to the chairman of the faculty-student appeals committee. If a student finds it impossible to complete discussions with the course instructor and department chairman within this two-week period, he/she should notify the chairman of the faculty-student appeals committee of the need for additional time, and the chairman shall extend the appeal period by an appropriate number of days.

b. The written appeal submitted to the chairman of the committee should provide an account of the facts pertinent to the awarding of the grade and the reasons why the student believes the grade or evaluation to be the result of prejudice or caprice or otherwise improper. The student should be as specific as possible. If the student wishes to appear personally before the committee, he or she should include a statement to that effect. The committee may, but shall not be required to, grant such a request.

c. Upon receiving the student's written statement the chairman of the committee shall forward copies to the committee members and to any faculty member involved. The chairman of the committee will request from such faculty member the materials used in determining the

grade or evaluation being challenged. The committee may also request clarification in writing or by interview from either the student or the faculty member. The committee may investigate the matter without interviewing either party, may interview both parties in the case separately or, in the discretion of the committee, may interview the student and the faculty member in the presence of each other.

d. If the committee decides to grant the request of the student to appear before it, the student will be given reasonable notice of the time and place of the hearing. The hearing need not be conducted according to the rules of law relating to the examination of witnesses or presentation of evidence. Any evidence may be admitted by the chairman, if in his/her discretion it is deemed to be relevant to the appeal.

e. In any appearance before the committee the student may be assisted by an advisor of choice if he/she has informed the chairman of the name of the advisor at least 24 hours before the hearing. The role of the advisor shall be limited to assisting the student and, unless the chairman of the committee specifically permits, the advisor may not directly question witnesses or otherwise participate in the proceedings. The committee may have the assistance of counsel for the University to advise the committee on procedural and other matters. The committee chairman shall direct the questioning of witnesses and determine the order of presentation of any testimony or other evidence. The chairman shall insure that the student, the faculty member involved, and all other wit-

nesses are treated fairly and that no witness is intimidated or harassed. The chairman shall have authority to recess the proceedings from time to time in the interest of convenience and justice.

f. In all cases the student shall be advised that the burden is upon him/her to show by the weight of the evidence that the grade or academic evaluation of which he/she complains was the result of prejudice or caprice or was otherwise improper.

g. At any time during the appeal process the student shall be entitled to examine his/her (entire) school file and shall also be entitled to examine the materials relating to the student which were used by the faculty member or members in determining the student's grade or evaluation.

h. The committee shall appoint some person, who may or may not be a member of the committee, to act as secretary of the committee. The secretary shall keep minutes of committee proceedings. Except in the case of actual hearings in matters involving academic suspension or dismissal, it shall not be necessary to maintain a verbatim transcript of testimony before the committee. The student may, however, record at personal expense any hearing or proceeding of the committee at which he/she is present.

8. Students desiring to appeal a grade or an evaluation of their academic progress which involves academic dismissal or suspension shall be subject to the rules prescribed in paragraph 7 above with the following exceptions and additions:

a. A student who is dismissed or suspended for academic reasons shall be given notice in writing of the dismissal or suspension by the Dean of the college or school involved. The notice shall state the reasons for the action taken and the effective date of the dismissal or suspension.

b. If the student desires to appeal a course grade or an evaluation of academic progress which led to the dismissal or suspension, the student shall, within two weeks from receiving the notice from the Dean, file an appeal in writing with the chairman of the faculty-student appeals committee. The appeal should state all facts pertinent to the appeal and should be as specific as possible concerning the student's position. If the student wishes to appear personally before the committee, he/she should include a statement to that effect and the committee shall grant such request. In such case the student shall be given reasonable advance notice of the time and place of hearing. The student may be represented by an advisor of choice who may assist the student but who may not question witnesses or otherwise participate in the proceedings unless the chairman of the committee specifically permits. The name of the student's advisor shall be supplied to the committee chairman at least 24 hours before the hearing. The committee shall not be required to grant a hearing at which both the student and faculty member(s) involved are present at the same time.

c. At the hearing conducted by the committee (if one has been requested by the student), the student shall first present his/her reasons for believing that the grade or

academic evaluation which led to dismissal or suspension was the result of prejudice or caprice or was otherwise improper. The student may use any relevant evidence deemed proper, including affidavits, exhibits and oral testimony. The committee has no subpoena powers and cannot compel the attendance of witnesses before it. Therefore, the responsibility of procuring any desired witnesses on his/her behalf rests solely with the student.

d. Any recommendations of the committee will be based solely on the results of its investigation and, if a hearing has been held, the evidence presented at the hearing.

e. The student, if he/she wishes, will be allowed to record at personal expense any hearing at which he/she is present, and the student shall also have access to the official recording of the proceedings under such conditions as the committee may prescribe.

9. At the conclusion of its investigation (or, if a hearing has been held at the request of the student, within a reasonable time after the hearing) the committee shall determine whether the student has sustained the burden of proving by the weight of the evidence that the grade or, academic evaluation complained of was the result of prejudice or caprice or was otherwise improper. If the committee finds by a majority vote of the entire committee, taken by secret ballot, that the student has sustained such burden, the committee shall submit its report and conclusions to the Dean and to the student involved. Thereupon the student's grade or evaluation shall be changed by order of the Dean is accordance with the committee's report and the matter shall be concluded. If the stu-

dent has been dismissed or suspended, and the change in the grade or evaluation removes the cause for academic dismissal or suspension, the student shall be reinstated and shall be given reasonable opportunity to make up any academic work missed. If conditions of subsequent performance accompany the reinstatement, these shall be communicated to the student.

10. If the committee finds that the grade or academic evaluation complained of was not the result of prejudice or caprice or otherwise improper, the committee shall likewise submit its report and conclusions to the Dean and to the student involved. In such case the student may, within ten days, submit an appeal in writing to the Dean setting forth any reasons he/she may have for believing he/she was not accorded a fair hearing by, or given a reasonable opportunity to present his/her case to the committee. The Dean shall make such review of the record and of the facts of the case as he/she deems appropriate and, at his/her discretion, may interview the student and such other persons as the Dean desires. The Dean's review, however, shall be limited to matters of procedure and fairness and shall not involve the merits of the case. If the Dean desires, he/she may be assisted by counsel for the University. The Dean shall then either affirm the findings of the committee or, if he/she concludes that the student was denied proper procedural safeguards, shall direct the committee to conduct a rehearing either in whole or in part. The decision of the Dean shall in all cases be final and no appeal may be taken therefrom.

11. In the event that the committee decides that the grade or other academic evaluation should be changed, the faculty

member who issued the grade or evaluation may appeal to the Dean if he or she feels that the procedures used by the committee were improper or that the committee did not properly consider all of the evidence. The Dean shall then review the record and the facts of the case as he/she would for a student appeal, as provided in section 10, and may return the matter to the committee for reconsideration. The decision of the Dean shall in all cases be final.

APPENDIX C

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

ORDER

Doc. 764 No. 47

THE STATE OF NEBRASKA, ex rel.,
GREGORY A. MERCURIO, JR.,

Relator,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The Court finds from the record presently before the Court, the following:

The Relator, Gregory A. Mercurio, Jr., was a graduate student at the University of Nebraska Medical Center. In June of 1978 the Relator was enrolled in a course entitled Biochemistry 510/810, which course was offered jointly for graduate students, as well as medical students. Supervision of the course was the assigned responsibility of the Chairman of the Biochemistry Department. Academic evaluation and grading was on an objective basis, each student being required to undertake three written examinations. The results of these examinations were the sole basis of determining the final evaluation or grade. The evidence indicated that the grades assigned to each individual examination were not distributed to the students following the grading thereof. At the conclu-

sion of the course the Relator was advised that he had been assigned a grade of "F" in Biochemistry 510/810.

The Relator testified that he questioned the propriety of the grade received and sought an interview with the Chairman of the Biochemistry Department on more than one occasion. He was advised that the three examination grades were "F", "F" and "C", respectively.

The Relator then requested permission to review certain of his academic records and specifically his examination answer sheet for his second examination, and later he requested his test answer booklet containing the test answer for examination number one. The testimony indicates that both examination papers and the results thereof were available and in the possession of the Chairman of the Biochemistry Department when the Relator made his request. However, the Relator was refused his request to examine the papers. Additionally, his faculty advisors who made similar requests to review the documents were unable to do so.

Upon inquiry, the Relator became aware of a right to challenge an educational record by appealing his grade thereon by a grade appeals procedure within the University. However, at that time the grade appeal procedures eventually adopted by the Respondent had not been developed and were not in force and effect. The evidence is conflicting, but it generally appears to the Court that the Relator was unable to commence an orderly challenge or appeal of his educational record. The Relator sought counsel and in August of 1979 filed a formal appeal with the University Grade Appeals Committee.

Pursuant to Section 84-915 R.R.S. 1943, Reissue of 1976, Relator made a request to the Grade Appeals Committee to proceed under said section.

Relator proceeded to pursue his attempt at a proper grade appeal.

Because of the Respondents' failure to have in force and effect a proper grade appeals procedure, and further because of the arbitrary attitude of the Grade Appeals Committee Chairman, the Relator resorted to the Court in an attempt to secure his rights. This action was instituted on September 17, 1979.

The Relator's positively verified Petition alleged that Respondents were a "State Agency" and as such were subject to the provisions of Section 84-914 R.R.S. 1943 (Reissue of 1976). Relator filed his request pursuant thereto. His request was denied. Further, Relator alleged deprivation of his due process rights under the Fourteenth Amendment of the Constitution of the United States and under the Statutes of the State of Nebraska pertaining to administrative state agencies. He prayed that a Writ of Mandamus issue compelling the Respondents to afford him a proper grade appeals hearing, at which adherance would be had to the formal Rules of Evidence applicable to the District Court; that he have the right to produce testimony from his faculty advisors; that Relator have the right of cross examination, and that the proceedings be recorded by a Court Reporter.

This Court ordered the Respondents to appear at a time fixed to show cause why a Writ of Mandamus should not issue. The Respondents filed their Answer, admitting that the

Relator was a student at the University of Nebraska Medical Center in the Graduate Studies Program; admitted that the Relator had made a formal request that the Committee follow the Rules of Evidence applicable in District Court, but denied that the Respondents were subject to Section 84-914 R.R.S. Nebraska 1943 (Reissue of 1976), because the Respondents were not an "Administrative State Agency" within the meaning of said Section. The Answer further alleged that the Grade Appeals Committee was governed by the general procedures for academic and grade appeals of graduate students established pursuant to paragraph 5.3 of the By-Laws of the Respondent, Board of Regents. Parties appeared by counsel. Hearing was had. Briefs were submitted.

It appearing to the Court that the Respondents might relent the arbitrary attitude of some of the employees of the Respondent, Board of Regents, the Court continued the matter, but retained jurisdiction for further hearing if the same appeared necessary. The Court expressed its reluctance "to inject the full jurisdiction of the judicial system into the academic scene, unless there is an arbitrary deprivation of Relator's rights."

Hearing was had before the Grade Appeals Committee. Among other things, the Respondents failed to make available to the Relator the examination papers from examinations one and two. It appears from the record that the results of the hearing were unfavorable to the Relator, but this Court is unable to know the true results thereof, because the Grade Appeals Committee did not reduce its decision and order to writing and accompany the same by findings of facts and conclusions of law as are required by Section 84-915 R.R.S. Nebraska 1943 (Reissue of 1976).

Relator took an "in-house" appeal as provided by Respondents' grade appeals procedure. From the record before the Court, the scope of this review was limited to the question of whether or not the Respondents' grade appeals procedures were accurately followed. There is no evidence before this Court to show that such procedures were accurately followed or that the Relator was granted a due process hearing.

The evidence before this Court is clear and undenied that the examination papers from examinations number one and number two were not produced by the Respondents at the Grade Appeals Committee hearing and were not made available to the Relator or to his faculty advisors, nor to the Dean of the Graduate College and Executive Vice President for Academic Affairs of the University of Nebraska, who conducted the review of the Grade Appeals Committee's procedures.

Both the Chairperson of the Grade Appeals Committee and the Chairman of the Biochemistry Department testified in behalf of the Respondent in its appearance to show cause why the Court's Order should not be carried into effect. The Respondent has failed to offer any credible evidence as to why the documents were not available to the Relator.

At the time of hearing on the Relator's Amended Petition, on Relator's Motion, the individually named Respondents were dismissed, leaving only one Respondent, The Board of Regents of the University of Nebraska.

CONCLUSIONS OF LAW

The Supreme Court of Nebraska in *Catania v. the University of Nebraska,* 204 Neb. 304, 282 NW 2d, held that the

Board of Regents of the University of Nebraska is a "state agency". Chapter 84, Article 9 R.R.S. Nebraska (Reissue 1976) mandates the rules and procedures for state agencies.

The Federal Education Rights and Privacy Act (F.E.R.P.S.) 20 U.S.C. 1232g and Regulations thereunder (45 C.F.R. 99) set forth requirements of educational institutions and students' rights.

State Ex Rel. Krieger v. Board of Supervisors, 171 Nebr. 117, 105 NW 2d 721, reviews the procedure in Mandamus in this State. It holds:

> "A Writ of Mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ, it must be made to appear that the Relator has a clear legal right to the performance by the Respondent of the duty which it is sought to enforce.
>
> To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and, (3) the duty to act must be clear."

Paragraphs 5.3 of the By-Laws of the Board of Regents of the University of Nebraska and the Grade Appeals Procedure adopted thereunder are mandatory requirements for Grade Appeal Committee hearings and procedure. 20 U.S.C. 1232g and Regulations thereunder (45 C.F.R. 99) clearly mandate the requirements provided thereby.

The test answer booklet containing test answers to Examination No. 1 and the computer answer sheet for Examination No. 2 are "Educational Records" as defined by §99.3.

The Relator sought to review his educational records pursuant to §99.11 and was denied.

The Relator challenged his educational records pursuant to §99.20.

Respondent had a duty to produce Relator's educational records for his review and use at the hearing.

§99.11 (b) (2) grants the student the right to obtain his educational records where the failure to obtain such copies would effectively prevent the student from challenging the accuracy of his academic record.

§99.13 prohibits destruction of such educational records where there is outstanding a request for review.

The Grade Appeals procedure written pursuant to paragraph 5.3 of the Board of Regents' By-Laws, requires that all materials used in determining a student's grade must be submitted to the Committee.

Respondent had a duty to produce for the Relator and at the Grade Appeals hearing, the documents pertaining to Examinations Numbers 1 and 2. That duty existed at the time of the hearing before this Court, and still exists. That duty is clear.

The record before this Court is clear that the subject documents were in the possession of the employees and agents of the Respondent at the time when the Relator clearly indicated to said employees or agents that he desired a review of his grade. This Court concludes from the evidence that there is no satisfactory explanation by the Respondent why the documents were not, and are not, produced. The record discloses that the examination papers of every other student in a class of more than 170 students were available, except

the papers of the Relator. The Respondent's attempted explanation that the Relator's papers must have been "lost or misplaced through inadvertence" is not acceptable to this Court.

In considering this evidence, the Court has not only considered all of the evidence in this case, and the law and the facts, but the Court observed the witnesses and their manner of testifying and their demeanor, not only while testifying, but in the Courtroom throughout the trial, and this Court concludes that a student should not be unduly burdened in his academic pursuits by either the failures or the conduct of those charged with responsibility in maintaining an academic institution, whose primary function is to educate students and prepare them for the careers that they seek.

While this is not a review of the administration procedures, yet the Court is impressed and does hereby record that the conduct of the employees and agents of the Respondent, Board of Regents, was both arbitrary and capricious.

After the Relator failed in his attempt to secure due process by the administrative procedures of the Relator, he filed a positively verified Amended Petition in this Court. This Court issued an Order to Show Cause on a fixed date. Respondent demurred to the Amended Petition. The Demurrer was overruled.

The Court issued an Order to the Respondent to "remove from the Relator's student transcript the transcribed grade of "F" in the course entitled Biochemistry 510/810, or to appear at the time fixed and show cause why they refused to do so.

Respondent filed an Answer to Alternative Writ of Mandamus and Relator's Amended Petition. Hearing was had thereon.

The evidence reflects that when the Relator was advised that the examination papers were unavailable to him, he offered to take forthwith, a comprehensive examination for the entire course. This was refused by the Respondent. If the examination papers and other pertinent documents are in fact not available, for whatever reason, this Court's Order to the Respondent to produce them would be meaningless.

State vs. City of Grand Island, 145 Nebr. 150, 15 NW 2d, 341, holds that mandamus is a proper remedy to enforce the performance of a ministerial act.

State v. Hyland, 75 Nebr. 767, 107 NW 2d, 113, holds that mandamus lies to compel surrender of records by an officer to its successor.

Jackson v. State, 57 Nebr. 183, 77 NW 2d, 662, holds that mandamus lies to reinstate a pupil in school.

This Court further recognizes that mandamus is not available if there is an adequate remedy at law. *Little v. Board of County Commissioners,* 179 Nebr. 655, 140 NW 2d 1.

While mandamus is a law action, equitable procedures and principles shall be applied.

State Ex Rel. v. Troup, 98 Neb. 333, 157 NW 748, holds:

> "When there is no adequate remedy in the ordinary course of the law, mandamus is the appropriate remedy."

It has been the history of the common law from the Magna Carta to the present, that when a wrong is perpetrated

upon a citizen and the only way he can afford himself due process in an attempt to correct that wrong is by the use of evidence in the hands of the adversary, the law will afford a remedy. An outstanding example of this is the promulgation of the principle of law of Res Ipso Loquitor. The same principle has been applied against educational institutions and the educational system of recent years by the Federal Courts, in instances too numerous to recite here.

In the case at bar, the Relator is entitled to have due process in an attempt to have a proper determination made as to whether he should be impeded in his educational pursuit by the grade administered to him. He is prevented, deprived and discriminated against in his attempt to use due process by either the failure or the conduct of the Respondent in not preserving and having available the Relator's educational records. It appears to this Court that mandamus is a proper remedy to afford the Relator due process.

THE COURT FINDS, that the Respondent, the Board of Regents of the University of Nebraska, has failed to show cause why the Court's Order of December 12, 1980 should not be complied with by the Respondent.

The Court further finds that the law imposed upon the Respondent a duty to produce to the Relator his educational records; that that duty presently exists and has existed throughout these proceedings; that the duty is clear and that therefore, mandamus should issue.

IT IS THEREFORE, CONSIDERED, ADJUDGED AND ORDERED, that the Respondent, the Board of Regents of the University of Nebraska be, and hereby is ordered to

remove from the student transcript of the Relator, Gregory A. Mercurio, Jr., the transcribed grade of "F" in the course entitled Biochemistry 510/810.

IT IS FURTHER ORDERED, that a peremptory Writ of Mandamus issue, directing the Respondent to forthwith carry out and comply with the hereinbefore set forth Order of the Court.

Dated this 11th day of May, 1981.

BY THE COURT:
s/s Theodore L. Richling
Judge

Office - Supreme Court, U.S
FILED
JUN 6 1983
ALEXANDER L. STEVAS,
CLERK

82-1808

In The

Supreme Court of the United States

October Term, 1983

---o---

STATE OF NEBRASKA, ex rel.,
GREGORY A. MERCURIO, JR.,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,
Respondent.

---o---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

---o---

RESPONDENT'S BRIEF IN OPPOSITION

---o---

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In The

Supreme Court of the United States

October Term, 1983

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STATE OF NEBRASKA, ex rel.,
GREGORY A. MERCURIO, JR.,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITY
OF NEBRASKA,
Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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OPINIONS BELOW

The opinion issued by the Supreme Court of the State of Nebraska on January 7, 1983, is reported at 213 Neb. 251, 329 N.W.2d 87 (1983) and appears in the separate Appendix A of the Petitioner's Brief.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was entered on January 7, 1983. The Petitioner's motion for rehearing was overruled on February 16, 1983. The Petition for a Writ of Certiorari was

filed on May 5, 1983, 51 U.S.L.W. 3827 (May 17, 1983). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory and regulatory provisions are involved in the resolution of this matter: (1) Constitution: U.S. Const. amend. XIV, § 1; (2) Statutes: 20 U.S.C. § 1232(g) (1976) and Neb. Rev. Stat. § 27-1004(1) (Reissue 1979); (3) Regulations: 45 C.F.R. § 99 (1981) and University of Nebraska Medical Center Procedural Guidelines for Handling Student Appeals of Academic Evaluations (Appendix B of Petitioner's Brief).

STATEMENT OF FACTS

The Biochemistry Course

Mr. Gregory A. Mercurio, the Petitioner in this case, was a graduate student at the University of Nebraska Medical Center in the summer of 1978. He enrolled in the Biochemistry 510/810 course which started in July, 1978. This class was large, consisting of 177 students. A number of Biochemistry Department faculty lectured in the course. Dr. William Ruegamer, Biochemistry Department Chairman and the chief lecturer in the course, served as overall faculty coordinator. Students were graded in the course based upon their performance in three objective, multiple choice examinations. No subjective criteria such as class attendance, participation or clinical work were involved in assigning grades to students. Dr. Ruegamer and the other faculty had never met or heard of Mr.

Mercurio prior to the course (Trial Transcript 12:9-14:22). Indeed, the only contact Dr. Ruegamer had with Mr. Mercurio prior to the completion of the course and the awarding of final grades was when he allowed Mr. Mercurio to take a make-up examination after missing the first regularly scheduled exam in the course (Trial Transcript 19:19-20).

Grading Procedures for Examinations

A grading policy for the Biochemistry 510/810 course was made available to all students in the class (Trial Transcript 14:5-15:22). A copy of the grading policy was received in evidence (E1:15, Vol. II). The correct answers and the distribution of percentage scores for regularly scheduled examinations in the course were posted on the departmental bulletin board following administration of the examinations. The correct answers for make-up examinations were not posted. Regardless of whether a student took a make-up or regularly scheduled examination, the only way for a student to find out his individual letter grade was to contact the Biochemistry departmental secretary. Therefore, it was impossible for the Petitioner to follow the procedure described in his Brief (at 3) for the first examination, and imprudent for him to rely on his self-scored performance for the second examination. At any time prior to the completion of the course the Petitioner could have learned what his grades were by checking with the departmental secretary, whose work place was in the vicinity of the bulletin board.

All three regularly scheduled exams were given in the same fashion. The students recorded their answers to the multiple choice questions by blackening

circles on computer answer sheets. The answer sheets were identified by each student's name and social security number, which he or she wrote on the answer sheet. The answer sheets were then computer graded (Trial Transcript 18:17-19:13). This process resulted in a printout showing the percentage score each student had received (Trial Transcript 34:4-25; E3:36, Vol. II).

There was a procedure by which those students who were unable to take a regularly scheduled exam could take a make-up exam (Trial Transcript 19:16-23). This situation occurred after each regularly scheduled exam and resulted in 20 to 25 students, perhaps 6 to 8 students each exam, taking a scheduled make-up examination that academic term (Trial Transcript 39:23-25). When taking a make-up examination a student would record his answers directly on the exam booklet. Each booklet would then be hand graded by a faculty member immediately after the testing had concluded (Trial Transcript 19:25-20:17).

Each student's score on each exam, whether the student had taken the regularly scheduled exam or the make-up exam, was recorded on his separate grade record sheet maintained in the Biochemistry Department (Trial Transcript 16:1-17:2). The score recorded was taken directly from the computer graded answer sheet, if the student had taken the regularly scheduled exam, or from the hand graded exam booklet, if the student had taken the make-up exam. Such a grade sheet was maintained for Mr. Mercurio (Trial Transcript E2:17, Vol. II).

Mr. Mercurio was unable to take the first regularly scheduled examination. Instead, he took the make-up

examination scheduled for students who had missed the first exam. This make-up examination was administered to Mr. Mercurio and other students by Dr. John Hofert, one of the teachers in the Biochemistry course (Trial Transcript 53:10-19). Dr. Hofert recalls Mr. Mercurio taking this examination and also recalls that he or Dr. Mahowold, another teacher, immediately hand graded Mr. Mercurio's make-up examination (Trial Transcript 53:22-54:14). Dr. Hofert specifically recalls that Mr. Mercurio's score on the exam was 42% (Trial Transcript 54:15-20). This score was entered on Exhibit 2, Mr. Mercurio's grade record sheet, by Mrs. Dickmeyer, the Biochemistry Department secretary. She specifically recalls Mr. Mercurio's test booklet and the score of 42% on it (Trial Transcript 156:7-158:10).

Mr. Mercurio took the regularly scheduled examination numbers two and three. His answer sheets were graded by a computer along with those of the other students in the course. After each exam, Mrs. Dickmeyer recorded his score on his grade record sheet, Exhibit 2. His three examination scores were:

Examination No. 1	42%
Examination No. 2	56%
Examination No. 3	69%
Final average	56%

(Trial Transcript Exhibit 2:17, Vol. II).

A grading committee for the Biochemistry Department voted on the cutoff points between the various letter grades. This voting was done without the Committee knowing how any particular student had performed in the course. The Committee voted to make 60% the dividing line between a "D" and a "F" in the

course. Mr. Mercurio's 56% was the lowest grade in the class. The next lowest grade before Mr. Mercurio's was 61%. Therefore, Mr. Mercurio was awarded an "F" in the course. (Trial Transcript 21:10-24: 25).

Mr. Mercurio took his three exams on August 4, August 26, and September 6, 1978. It should be noted that within three to four days after each exam, after the scores for each exam had been recorded on the students' grade record sheets, students could find out their score by going to the Department of Biochemistry and asking the Department secretary (Trial Transcript 25:5-12).

Mr. Mercurio Questions His Grade

The course concluded in the first week of September, 1978 and final grades were thereafter awarded to all students. About one week later, on September 15, 1978, Mr. Mercurio met with Dr. Ruegamer about his grade. Mr. Mercurio indicated that he had a question about his grade on Exam #2. Specifically, he felt that he had inadvertently made a transposition error in filling in his answers on his answer sheet for that exam (Trial Transcript 100:21-101:2; 146:5-18). Dr. Ruegamer agreed to review the matter and meet Mr. Mercurio on September 19, 1978.

Before this next meeting, Dr. Ruegamer retrieved Mr. Mercurio's computer answer sheet for Exam #2 from the Department's file. Both he and another faculty member each inspected and hand graded Mr. Mercurio's answer sheet for that exam (Trial Transcript 30:10-17). They both reached the same result as

the computer, 56% correct answers (Trial Transcript 38:2-6). At their September 19 meeting, Dr. Ruegamer and Mr. Mercurio reviewed his answer sheet for Exam #2. Mr. Mercurio continued to state that the result must have been a transposition error, but did not dispute the fact that the 56% actually reflected the answers on his answer sheet (Trial Transcript 109:13-110:22 and 148:1-14). Dr. Ruegamer explained that the Department could not make any adjustment based upon the claim of a transposition error after exams were handed in and graded (Trial Transcript 109:16-24). At no time during these meetings did Mr. Mercurio question his score on Exam #1 or ask to see his answer sheet for that exam (Trial Transcript 148:9-13 and 105:7-9).

The Missing Examination Papers

Dr. Ruegamer testified that he never saw Mr. Mercurio's answer sheet for Exam #2 after he discussed it with him on September 19, 1978 (Trial Transcript 32:5-34:1). He first realized that he could not locate it in December, 1978, when he was asked to review that matter with Mr. Mercurio's faculty advisors (Trial Transcript 46:1-3). Apparently the exam was somehow lost in the process of the post-course review with Mr. Mercurio (Trial Transcript 32:5-22).

As indicated, after the September, 1978 meetings with Mr. Mercurio, Dr. Ruegamer had no reason to believe that Mr. Mercurio's answer booklet to Exam #1 was in question (Trial Transcript 41:17-19 and 148:9-13). After the course, it was at all times kept with the 20 to 25 other exam booklets for the course which had been used by students in taking make-up exams. At

some time, two or three months after the course was concluded, Dr. Ruegamer placed the file containing all these make-up exams in the Department secretarial office to be refiled in old storage (Trial Transcript 149:15-150:20). Instead, they were apparently discarded (Trial Transcript 149:15-151:14). This fact was not discovered until after May, 1979, when Mr. Mercurio lodged an internal grade appeal (Trial Transcript 115:21-116:8).

Petitioner's Brief contains a gross misstatement of fact on pages 5 and 11. Petitioner, citing the clearly erroneous finding of the trial court, therein contends that only the two examination papers of the Petitioner could not be produced by the University. It is true that of all the answer sheets for Examination #2, only the Petitioner's was missing. Dr. Ruegamer testified that he never saw the Petitioner's answer sheet for Examination #2 after he discussed it with the Petitioner on September 19, 1978 (Trial Transcript 32:5-34:1). He first realized that he could not locate it in December, 1978, when he was asked to review the matter with the Petitioner's faculty advisors (Trial Transcript 46:1-3). However, *all* of the 20 to 25 answer sheets for all make-up examinations were missing (Trial Transcript 82:13-14 and 149:15-151:14), a fact which was not discovered until after May, 1979, when Petitioner lodged an internal grade appeal and questioned his score for Examination #1 for the first time (Trial Transcript 115:21-116:8).

The Internal Appeal

Mr. Mercurio sought and was granted a grade appeal hearing at the University. By the time he ap-

pealed in May, 1979, new grade appeal procedures were in place and the appeal was heard under these procedures (Trial Transcript E5 and E6; 62, Vol. II). The Grade Appeals Committee did not actually hear the appeal until March, 1980, because the Petitioner filed his original petition for writ of mandamus in September, 1979, asking the District Court to require the hearing to follow the statutory rules of hearing procedure for administrative agencies. Eventually, the ground rules for the hearing were agreed upon by the University and Mr. Mercurio and two days of hearings were conducted (Trial Transcript 57:8-61:10). The Appeals Committee heard the facts of the case, including the evidence the Biochemistry Department had to corroborate the grade, and decided the grade should stand despite the absence of the missing exam papers. A complete tape of the two days of hearing testimony and a complete file of all written material presented at the Grade Appeals Committee was maintained (E7 and E8; 67, Box). After this record had been reviewed and the Appeals Committee decision approved by the Executive Vice President for Academic Affairs at the University, Mr. Mercurio filed his amended petition resulting in the order of the trial court (Appendix C of Petitioner's Brief). The University appealed the trial court's order and the Supreme Court of the State of Nebraska in a unanimous opinion reversed the decision of the trial court and dismissed the Petitioner's action, vacating the writ of mandamus. The Petitioner filed a motion for rehearing before the Nebraska State Supreme Court arguing that the Court had failed to consider the issue of deprivation of Petitioner's right of due process. That motion was summarily overruled without opinion on February 16, 1983.

The Petitioner now complains of the failure of the Nebraska Supreme Court to address the Petitioner's argument that he had been denied due process of law.

ARGUMENTS

This Court should deny the Petitioner's request for issuance of a writ of certiorari for the following reasons:

1. Properly exercising self-restraint, the Nebraska Supreme Court carried out its general and basic judicial duty to avoid the decision of a constitutional question.

The policy of strict necessity in disposing of constitutional issues is a useful device that helps assure that judicial review does not take place gratuitously. Nowak, Rotunda, and Young, *Handbook on Constitutional Law* (1978) 84. Constitutional issues will not be determined if the record presents some other ground upon which the case may be disposed of. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-574 (1947).

2. The Nebraska Supreme Court's opinion rests on adequate and independent state grounds.

This Court, from the time of its foundation, has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). The Supreme Court is without jurisdiction because the Nebraska Supreme Court, although pre-

sented with a federal ground of decision only chose to base its decision on the non-federal grounds which in and of themselves do not violate federal law. *Wood v. Chesborough*, 228 U.S. 672 (1913).

3. The Petitioner's argument that he has been denied due process of law is totally devoid of merit.

The Petitioner argues in his Brief at 15 that no copies or secondary evidence were offered by the Respondent at the trial concerning the contents of Examination #1 and Examination #2. This ignores the portion of the Nebraska Supreme Court's opinion that the record before it on appeal was replete with

> the testimony of various faculty and administrative personnel [that] was uncontradicted that they had examined the missing documents, had graded them, and that the grade was directly transferred to the grade sheet of Mercurio. There is simply no evidence of bad faith, malice, or fraud. If we accepted Mercurio's argument, any student who received a failing grade in any course who discovered one of his examination papers was missing from the University records could have his grade expunged because the record had been lost, misplaced, or destroyed. The secondary evidence as to the missing documents in the present case was given by witnesses under oath subject to the rigors of cross-examination, and it was more than sufficient to establish the accuracy and validity of the grading of the missing documents.
>
> 213 Neb. 251, 258; 329 N.W.2d 87, 91-92 (1983).

The Petitioner, in his Brief at 13, ascribes the University's failure to produce the examination papers for

examinations one and two to possible "misconduct" by the Respondent. It is important to note that the University briefed and argued in its Reply Brief before the Nebraska Supreme Court the proposition that "Bad faith or intentional obstruction of justice is necessary to support the implication of the doctrine of spoliation. Mere negligence is not enough to invoke the doctrine of spoliation." See Reply Brief of the University, Argument III, pages 6-10. This explains why the Nebraska Supreme Court chose to include the sentence that "There is simply no evidence of bad faith, malice or fraud." 213 Neb. at 258; 329 N.W.2d at 91 (1983). Having reviewed the record, the Nebraska Supreme Court applied the relevant statute, Neb. Rev. Stat. § 27-1004(1) (Reissue 1979), to the facts on the record before it. It concluded that as a matter of the law of evidence the Petitioner failed to show that he was entitled to the particular relief requested and granted by the trial court and that the Board of Regents of the University of Nebraska was legally obligated to act. 213 Neb. at 259. The Petitioner's Brief before this Court at 15 describes that holding as "irrelevant to the facts and issues of this case." *Ipse dixit.*

In addition, as the Respondent pointed out in its Reply Brief filed in the Supreme Court of the State of Nebraska at 9: "With respect to the second examination, in addition to the testimony of witnesses, the University had (and still has) the original computer printout showing the [Petitioner's] score for the second examination. The remarks of the trial court in- (139:7-142:25) on the subject of computer printoutarding dicate a disregard for the law of evidence regarding business records as enunciated in *Bobbie Folks, Inc. v. Hyatt*, 195 Neb. 596, 239 N.W.2d 782 (1976)." The original of the computer printout was introduced at trial as Exhibit No. 3.

The meritless nature of the Petitioner's due process claims lies in their failure to address a line of cases involving allegations by unsuccessful test takers that an examiner violated constitutional guarantees to due process of law by failing to produce copies of the applicants' examination papers, thereby denying a failing applicant an opportunity to examine the applicant's own examination.

In *Brewer v. Wegmann*, 691 F.2d 216 (5th Cir. 1982) an unsuccessful applicant for membership in the Louisiana State Bar brought an action alleging that the examining bar association denied her due process by destroying examinations after they were graded. The U.S. District Court for the Eastern District of Louisiana, George Arceneaux, Jr. J., dismissed the complaint. The Court of Appeals in a per curiam opinion held that the bar examination procedure which included the destruction of examinations after grading thereby denying a failing applicant an opportunity to examine her own examination or secure review of the fairness of the grade did not violate due process of law. The *Brewer* Court relied on a well established body of law citing to *Singleton v. Louisiana State Bar Association*, 413 F.Supp. 1092, 1098-1100 (E.D.La. 1976) and *Tyler v. Vickery*, 517 F.2d 1089, 1103-1105 (5th Cir. 1975). See generally: Annot., *Court Review of Bar Examiner's Decision on Applicant's Examination*, 39 A.L.R.3d 719 (1971); Annot., *Due Process Requirements of Proceedings Involving Applications for Admission to Bar*, 2 A.L.R.3d 1266 (1965); Annot., *Validity, Under Federal Constitution of State Bar Examination Procedures*, 30 A.L.R.Fed. 934 § 6[b] (1976). *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974).

The Petitioner's Brief in its presentation of the question to this Court argues at 12 that "It is axiomatic to suggest that an agency of state is required to follow its own rules and, in this instance, the failure to do so is a separate and distinct due process violation." The Petitioner cites no authority for this axiom. When the Petitioner comes forward with something more than rhetoric in support of this claim, the University will respond to his bald assertion.

As was the situation in *Tyler v. Vickery, supra*, the Petitioner, rather than engaging in litigation, would be well advised to direct his resources toward retaking the course and proving his merit on subsequent examinations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Nebraska should be denied.

Respectfully submitted,

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